IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-339

FUCHS SUGARS & SYRUPS, INC.
and FRANCIS J. PRAEL,
doing business as LEWIS & COMPANY,

Petitioners,

—against—

AMSTAR CORPORATION

Respondent.

REPLY BRIEF FOR PETITIONERS

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Petitioners submit this Reply Brief in response to respondent Amstar's Brief in Opposition.

I

Although Amstar urged both courts below that, under *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968), coercion is a necessary element in the formation of a Sherman Act combination, it now appears to concede that it would have been error for the Court of Appeals to have so held, and does not deny that such a holding would present an important federal question, and one which would have been inconsistent with almost sixty years of prior decisions of this Court. Instead, the Brief in Opposition protests that "the false issue of 'coercion' is irrelevant" (Amstar Br.,

p. 8)*, and that petitioners have misstated the Court of Appeals' holding as "supposedly ruling that proof of 'coercion' is necessary to give rise to a Section 1 agreement. . . ." It goes on to say "[t]he Court of Appeals made no such ruling . . ." and that " '[c]oercion' was not an issue below at all." (Amstar Br., pp. 6-7)

The complete answer to these assertions is, of course, found in the Court of Appeals' decision:

> "The *Albrecht* finding of an unlawful combination has been read in this circuit to apply only where there is evidence of knowing and active participation by a dealer and his manufacturer in a scheme to coerce compliance with anticompetitive activity such as resale price maintenance." (A13)

The court's holding is exactly what Amstar urged both lower courts to rule. The District Court, while rejecting its argument, stated "Amstar urges, however, that there could be no unlawful combination or conspiracy unless the terminations were for the purpose of coercing future compliance with an illegal plan." (A30) And in its brief to the Court of Appeals, Amstar urged in language adopted almost word for word by that Court:

> "The *Albrecht* finding of an unlawful combination has been read by this Court and by other Courts of of Appeals to apply only where there is evidence of knowing participation in a joint effort actively to coerce future compliance by a plaintiff with some unlawful activity, such as resale price maintenance." (p. 38)

Having led the Court of Appeals to error, Amstar tries to disavow the holding that it sought and secured.

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* Respondent's Brief in Opposition is referenced in this Reply Brief as "Amstar Br."

Proceeding with its thesis that the Court of Appeals did not require that coercion must be shown in order for a combination to be proved, Amstar argues that all the Court of Appeals required was an anticompetitive purpose and that it was not concerned with the "means" by which the objective was to be accomplished. Quoting language used by the Court of Appeals in its preliminary discussion (at A8, not A13) setting forth the framework for analyzing a Section 1 violation under the rule of reason, the Brief in Opposition urges that:

> "It is the collaborative effort to extract 'some collateral anticompetitive advantage' which the Court of Appeals found essential (A8, A13), not the means by which such advantage was extracted." (p. 7)

Amstar's argument confuses combination—the issue on which the Court of Appeals decided the case—with the issue of unlawful purpose and effect. Contrary to Amstar's assertion, the Court of Appeals' decision turned on the means used to form the combination, and the Court held that because there was no coercion, no combination was proved. The Court never considered Amstar's "anticompetitive advantage" which the Brief in Opposition argues was the "essential" point. Nothing makes this so clear as a footnote at page 6 of the Brief in Opposition in which Amstar, after referring to "the Court of Appeals' finding of an absence of any combination or conspiracy" goes on to point out that the Court of Appeals

> "did not reach or pass upon other issues raised by Amstar, such as the lack of evidence that Amstar's actions harmed competition or that plaintiffs suffered antitrust injury. Even if the Court of Appeals' judgment were reversed, it would be necessary for that court to address these matters before plaintiffs

would be entitled to any reinstatement of the trial court's judgment."*

Although Amstar urges that the issue of coercion is a "false" one because the Court of Appeals' holding turned only on a failure to prove a purpose "to extract some collateral anticompetitive advantage" and that the court was not concerned with "means", three times Amstar states (Amstar Br., pp. 7-8) that no combination is proved unless the means of reaching the anticompetitive goal involves securing the compliance of dissident distributors. But if the only combination cognizable under Section 1 is one which results from threatened or actual termination, in order "to secure compliance" of distributors who would not otherwise go along, coercion is the means used in achieving the combination. And whether or not the word "coercion" is used, such a test of combination certainly excludes a joint effort by a manufacturer and enough distributors willing to assist the manufacturer in extracting "some collateral anticompetitive advantage", so that those who are unwilling to go along do not have to be forced into compliance and can be permanently terminated.**

* Although Amstar is correct that the Court of Appeals did not even address the issues of Amstar's purpose and the effect of Amstar's actions on competition, plaintiffs dispute the contention that such a failure would dictate the remand of this case to the Court of Appeals, since the only error the Court of Appeals found in the District Court's opinion was its holding that Amstar's joint action with certain of the converted general brokers constituted a combination.

** Where the cases cited in the Petition did not involve an effort to force the distributors back into adherence with an unlawful scheme and the uncooperative distributors were simply abandoned, Amstar characterizes these terminations as "retaliatory" (see discussion of cases at Amstar Br., p. 8). Amstar's termination of the general sugar brokers could more easily be so characterized. As noted in the Petition (p. 19, n.), an Amstar executive told one of the general brokers that unless general brokers "contribut[ed] a better role in pricing in the market . . . your days are numbered." (1316a)

II

One further point requires reply. Amstar contends (Amstar Br., p. 11) that the Court of Appeals ruled that because plaintiffs and the other general brokers were Amstar's selling agents, they were incapable of conspiring with Amstar as a matter of law. The Court of Appeals did not so hold. After the Court of Appeals noted that "[a]lthough the Court below stated that Amstar did not contend that the general brokers (and presumably the direct brokers) were so lacking in independence that any conspiracy with them would have been intracorporate (447 F. Supp. at 874 n.10), the record indicates the contrary" (A9, n.4), and after it had outlined Amstar's arguments (A9), the Court of Appeals stated "[w]e hold that the evidence *only* supports the conclusion that Amstar acted unilaterally." (A10, emphasis added)

Whether or not Amstar had abandoned this point, the precedents do not support the proposition that "as a matter of law" Amstar could not combine with agents such as the general sugar brokers. Amstar relies on *Albrecht* for this proposition.* The Brief in Opposition claims that in *Albrecht* there was significant economic independence between those who combined, but adverts to the wrong combiners. It refers to a "joint effort" in which "a terminated distributor (who was in that case an independent economic entity, not a mere broker agent)" would engage "in some unlawful activity . . ." (Amstar Br., p. 7) Nowhere does Amstar even mention the Herald's two agents with which this Court in fact held the Herald had combined—Kroner, the routeman who was paid to solicit cus-

* Amstar also relies on *Simpson* v. *Union Oil*, 377 U.S. 13 (1964) at p. 11 of its Brief in Opposition, a case in which the terminated distributor-plaintiff was an agent for consignment and the jurisdictional prerequisite of combination or conspiracy was found.

tomers (and never took title to the Herald's papers) and Milne, who delivered them.* Certainly, Amstar cannot contend that the routeman and customer solicitor who were found to have conspired with the Herald were more "independent economic entities" than the substantial brokerage firms which cooperated with Amstar in distributing sugar to a newly stabilized market and who engaged in protracted negotiations with Amstar before doing so. (1802a-1804a, 1824a-1826a)

If further authority is necessary to demonstrate the fallacy of Amstar's argument that a manufacturer is incapable, as a matter of law, of combining with its agents, *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977) and its predecessor, *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) are dispositive on this question.

In *Schwinn*, this Court held that an unlawful Section 1 combination can be proved between a manufacturer and a sales agent to which title never passes and which has no dominion or risk with respect to the product. Passing the threshold question of combination, the Court pointed out that in those cases

> "[w]here the manufacturer retains title, dominion, and risk with respect to the product . . . it is only if the impact of the confinement is 'unreasonably' restrictive of competition that a violation of § 1 results from such confinement, unencumbered by culpable price fixing." 365 U.S. at 380.

In *Continental T.V., Inc.* v. *GTE Sylvania, Inc., supra*, the Court eliminated the distinction between (a) cases

* As the Seventh Circuit observed, "it would seem that Milne and Kroner were merely the agents of the newspaper . . ." *Tamaron Distributing Corp.* v. *Weiner*, 418 F.2d 137, 138 (1969).

where the manufacturer is alleged to have combined in restraint of trade with a distributor who purchases its products, *i.e.*, "sale transactions" and (b) cases where, as here, the manufacturer does not sell its goods but distributes them through a sales agent, who does not take title and has no control over price, but is alleged to have combined in violation of Section 1 in "nonsale transactions". Both situations had always been cognizable under Section 1, but a rule of reason examination of the facts regarding the purpose or effect of the joint action had always been required in "nonsale transactions", whereas such proof had been dispensed with in certain "sale transactions". The Court summarized its earlier decision in *Schwinn* as follows:

> "But the Court expressly stated that the rule of reason governs when 'the manufacturer retains title, dominion, and risk with respect to the product and *the position and function of the dealer in question are, in fact, indistinguishable from those of an agent or salesman of the manufacturer.*' *Id.* at 380." 433 U.S. at 44-45 (emphasis added).

Obliterating that distinction, and putting it beyond question that a manufacturer and its sales agent, distributing in a "nonsale transaction" may combine to violate Section 1 if their joint action offends the rule of reason, the Court held:

> "We conclude that the distinction drawn in *Schwinn* between sale and nonsale transactions is not sufficient to justify the application of a *per se* rule in one situation and rule of reason in the other. The question remains whether the *per se* rule stated in *Schwinn* should be expanded to include nonsale transactions or abandoned in favor of a return to the rule of reason. We have found no persuasive support for expanding the *per se* rule." 433 U.S. at 57.

The facts of *Pacific Coast Agricultural Export Ass'n* v. *Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975) *cert. denied*, 425 U.S. 959 (1976) are virtually identical on the question of combination between a supplier and a broker who becomes an exclusive sales agent. Amstar asserts that the case is distinguishable because, it claims, the purpose of the defendant Sunkist was to drive its competitors out of business and, Amstar states, "[t]here is no claim by plaintiffs in this case that Amstar's termination of general brokers had the purpose or effect of driving any competitor [of Amstar] out of business . . ." (Amstar Br., p. 9)

Although purpose and effect are not relevant to the question of combination raised by this petition, Amstar misreads *Sunkist* even on that issue. The plaintiffs in *Sunkist* were "exporting companies" (526 F.2d at 1201) through which Sunkist had distributed its oranges to the Far East and who, like plaintiffs here, were injured when all of them were terminated as a consequence of Sunkist's arrangement with the broker who had acceded to Sunkist's plan for exclusive distribution. Although the Brief in Opposition concedes that Amstar's unlawful purpose was not involved in the Court of Appeals' decision (p. 6, n.), it should be noted that Amstar's predatory purpose *vis-a-vis* those who were terminated is as clear in this case as in *Sunkist*. The evidence at the trial showed that Amstar believed the entire general sugar brokerage business would ultimately end when it took its action. In the written program setting forth Amstar's plan, it observed "the general broker concept depends upon the cooperation of the American Sugar Company [Amstar]" and, predicted that, after the terminations, most of its competitors would follow suit and abandon sales through general brokers.* (Plaintiffs' Exhibit 33)

* Except for two small refiners, "South Coast" and "Southdown", as to which, in a listing of competitors showing their probable reaction to Amstar's proposed conversion of general brokers into direct brokers, the memo stated "Who cares". (Plaintiffs' Exhibit 33, p.5)

CONCLUSION

The question of combination is basic to any analysis of Section 1 of the Sherman Act and the grant of certiorari to correct the Second Circuit's error will avoid confusion which has already been generated regarding this threshold question.

Furthermore, Amstar's Brief in Opposition suggests that the public interest will not be affected by the disposition of this case, because it seeks to create the impression that very little of its product was distributed through the channels which are the subject of this case. In fact, as stated in the Petition, in markets like New York, seventy-five percent of Amstar's products had been distributed through general brokers.* Amstar's Brief in Opposition refers to that distribution as an "anachronistic way of merchandising" which "is a vestige of the nineteenth century." (Amstar Br., p. 3) It may be that the interposition of a brokerage system between buyer and seller is not typical, particularly in an oligopolistic industry. But Professor Elzinga, the expert sponsored by Amstar and other defendants in the multidistrict *Sugar Industry Antitrust Litigation*, M.D.L. No. 201 (N.D. Cal.) did not consider them unique.** He described the distribution of refined sugar through general brokers as follows:

> "The broker in those transactions performs the functions that middlemen perform in many industries . . . [T]hey . . . provide a natural negotiating force."

Professor Eichner testified at the trial of this action that where an industry is highly concentrated, a "middleman

* Amstar states that plaintiffs were replaced by salaried salesmen in New York City. (Amstar Br., p. 5) That is not true. As Amstar stated in its brief to the Court of Appeals:

> "When Fuchs itself was terminated at the end of March 1974, ABD succeeded to the role of the only Amstar direct food broker in New York." (p. 42)

** See Petition, p. 5, n.**

network" of this character has often been eliminated, but that, "in those industries where it still remains there is competition." (1278a-1279a)

The grant of certiorari here will, therefore, not only permit the resolution of a basic question of antitrust law, wrongly decided by the Second Circuit, but will affect prices paid throughout the country for an important food product.

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Respectfully submitted,

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